Supreme Court, U. S.
FILED
JUN 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1735

In the
Supreme Court of the United States

JACQUELINE JARRETT,
Petitioner,

vs.

WALTER JARRETT,
Respondent.

BRIEF IN OPPOSITION

ARTHUR M. SOLOMON
7 S. Dearborn Street
Chicago, Illinois 60603
(312) 782-2603
Attorney for Respondent.

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions for Review 1

Statutes and Rules 2

Statement of the Case 2

Argument 6

I. This Court lacks jurisdiction because no federal question was timely and properly raised in the State Courts 6

II. The record indicates no deprivation of Constitutional Rights 7

Conclusion 13

TABLE OF AUTHORITIES

FEDERAL CASES:

Sosna v. *Iowa*, 419 U.S. 393 (1974) 10

Stanley v. *Illinois*, 405 U.S. 645 (1972) 5

Quilloin v. *Walcott*, 434 U.S. 246 (1978) 8, 9

ILLINOIS STATE CASES:

Arden v. *Arden*, 25 Ill. App. 2d 181, 166 N.E. 2d 111 (1960) 10

Christensen v. *Christensen*, 31 Ill. App. 3d 1041, 335 N.E. 2d 581 (1975) 10

Collins v. *Collins*, 120 Ill. App. 2d 125, 256 N.E. 2d 108 (1970) 10

Gehn v. *Gehn*, 51 Ill. App. 3d 946, 367 N.E. 2d 508 (1977) 8

PAGE

Hahn v. *Hahn,* 69 Ill. App. 2d 302, 216 N.E. 2d 229 (1965) 8

In re Custody of Harne, 33 Ill. Dec. 110, 396 N.E. 2d 499 (1979) 11

Hendrickson v. *Hendrickson,* 49 Ill. App. 3d 160, 364 N.E. 2d 566 (1977) 10

Huey v. *Huey,* 25 Ill. App. 3d 20, 322 N.E. 2d 560 (1975) 10

Kline v. *Kline,* 57 Ill. App. 2d 244, 205 N.E. 2d 774 (1965) 8

In re Custody of Nodot, 81 Ill. App. 3d 883, ... N.E. 2d ..... (1980) 10

Nye v. *Nye,* 411 Ill. 408, 105 N.E. 2d 300 (1952) 8

Pratt v. *Pratt,* 29 Ill. App. 3d 214, 330 N.E. 2d 244 (1975) 8

Rippon v. *Rippon,* 64 Ill. App. 3d 465, 381 N.E. 2d 70 (1978) 10

Strand v. *Strand,* 41 Ill. App. 3d 651, 355 N.E. 2d 47 (1976) 8

OTHER STATE CASES:

In re: *Burrell,* 58 Ohio St. 2d 37, 388 N.E. 2d 38 (1979) 9

STATUTES AND RULES:

28 U.S.C. Section 1257 (3) 2

Rules of the Supreme Court of the United States, Rule 23 (1)(f) 6

Rules of the Supreme Court of Illinois, Rule 367(b) .. 5, 7

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1735

JACQUELINE JARRETT,

Petitioner,

vs.

WALTER JARRETT,

Respondent.

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the Illinois Appellate Court and the Supreme Court of Illinois are set forth as described in the Petition. The official citation to the Illinois Supreme Court opinion is 78 Ill. 2d 337.

JURISDICTION

This Court lacks jurisdiction because no federal question was timely and properly raised in the state courts pursuant to 28 U.S.C. §1257 (3); Supreme Court Rule 23 (1) (f); Illinois Supreme Court Rule 367(b).

QUESTIONS FOR REVIEW

1. Whether jurisdiction is lacking because no federal question was timely and properly raised in the state courts.

2. Where custody of the children was awarded to their father after a full hearing on his petition to modify a divorce decree, was the petitioner deprived of any constitutional rights.

STATUTES AND RULES

Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. 1977, Ch. 40 Section 610(b) as set forth in Pet. App. 32 a; 28 U.S.C. §1257 (3); The pertinent provisions of the United States Supreme Court Rule 23(1)(f) are set forth in this Brief at p. 6; The pertinent provisions of Supreme Court of Illinois Rule 367 (b) are set forth in this Brief at p. 7.

STATEMENT OF THE CASE

At the time of their divorce in December 1976, the parties entered into a written agreement incorporated into the decree giving custody of the children, then aged 12, 10 and 7, to the petitioner. (R.C-3,C-6,C-12,C-13). Pursuant to the agreement, the father was given visitation rights which he exercised regularly, the children staying with him on weekends, going to church with him and eating meals he prepared for them. (R. 5).

In April 1977, 4 months after the divorce decree, petitioner's lover, Wayne Hammon, moved into the house with petitioner and the girls. Petitioner admitted in her pleadings that this constituted a change in circumstances from the time the decree was entered. (R.C-17,C-18).

The children were not "overly enthused" when they first learned that Hammon would move into their home, and they asked petitioner if she intended to marry Hammon. She responded that she didn't know. (R.28, 29).

Petitioner and Mr. Hammon both told the three girls that it was not wrong or immoral for an unmarried couple to live together. (R. 19, 30).

At the hearing on modification of custody, petitioner and Hammon testified that they had no present intention of getting married. (R. 20, 30). Two years and five months later, at the time of oral argument before the Supreme Court of Illinois, they were still cohabiting although unmarried. (See Pet. App. 8a)*

On July 12, 1977, the Circuit Court of Cook County held a full evidentiary hearing on the modification of custody. Both parties and their attorneys were present and introduced into evidence all testimony thought to be relevant. No proffered evidence was denied admission. Both Hammon and the petitioner testified that Walter Jarrett was a good father and a fit parent. (R. 22, 35). There being no dispute on the facts the sole issue presented was the application of Illinois Law. (R.C-16-C-19).

On July 17, 1977, the trial court entered an Amendment to the Divorce Decree, and awarded custody to the children's father, Walter Jarrett. (R.C-21-C-23).

The Court held that the best interest of the children would be served by the change in custody. (R.C-22). Petitioner was given reasonable visitation rights, and sees the children several days each week. (R.C.-23).

The petitioner filed a Motion for Rehearing which was denied. (R.C-24) and an appeal was taken to the Illinois Appellate Court. The petitioner's motion for a stay

---

* "Pet. App. refers to the Appendix filed in this Court by the petitioner."

pending appeal was also denied, (R.C-24) and the children have been living with their father since the autumn of 1977. To accommodate his daughters, respondent rented a larger apartment in the girls' school district.

On September 13, 1978, the Illinois Appellate Court reversed the trial court, relying exclusively on interpretations of Illinois custody law. No federal issues were raised by the parties or considered by the Appellate Court. (Pet. App. D).

On December 20, 1979, the Supreme Court of Illinois reversed the judgment of the Appellate Court by a 5 to 2 vote and affirmed the judgment of the Circuit Court of Cook County. The Supreme Court ruled that the trial court's action in transferring custody to Walter Jarrett, "an equally caring and affectionate parent whose conduct did not contravene the standards established by the General Assembly and earlier judicial decisions," was not contrary to the manifest weight of the evidence. (Pet. App. 10a, 18a).

The Supreme Court of Illinois stated that the welfare of the child is the focus of custody determinations in Illinois. (Pet. App. 5a). It ruled that petitioner's "disregard for existing standards of conduct instructs her children, by example, that they, too, may ignore them," and that this factor "supports the trial court's conclusion that their daily presence in that environment was injurious to the moral well-being and development of the children." (Pet. App. 7a).

Nowhere in the opinion of the Supreme Court of Illinois is there "presumptive language" as asserted by petitioner. (Petition 9). Instead, the court stressed that custody is not mechanically denied in every instance

where the custodial parent violates community moral standards. (Pet. App. 7a). The Court cited numerous cases in which custody was retained where there was an improbability of such lapses in the future, or where the children were unaware of their parent's moral indiscretion. (Pet. App. 7a-8a). The court pointed out that, "The trial court did not presume that Jacqueline was not an adequate parent. . . . Rather the trial court recognized that the affection and care of a parent do not alone assure the welfare of the child if other conduct of the parent threatens the child's moral development." (Pet. App. 10a).

The court based its decision on its interpretation of Illinois statutes and case law. It did not pass upon the question of due process raised by petitioner in her brief except to comment that the case before it "is fundamentally different" from the case of *Stanley* v. *Illinois,* 405 U.S. 645 (1972), since there was no presumption of unfitness in the instant case. (Pet. App. 10a). The initial dissenting opinion by two justices discusses Illinois law exclusively and contains no reference to any federal issue. (Pet. App. 11a-12a).

On February 1, 1980, the petitioner filed a Petition for Rehearing which was denied. In that petition, for the first time, and contrary to Supreme Court of Illinois Rule 367 (b), the petitioner suggested an issue of equal protection. Since this claim was not timely raised, the five justices in the majority did not deal with the new issue and reiterated their original decision. (See Pet. App. B.). The two dissenters also failed to consider the issue of equal protection in the additional opinion drafted after the Petition for Rehearing, confining their discussion to issues raised previously. (Pet. App. C).

ARGUMENT

I.

This Court lacks jurisdiction because no federal question was timely and properly raised in the State Courts.

Where review of a state court is sought, Supreme Court Rule 23(i)(f) requires the petitioner, in his Statement of Case, to "specify the stage in the proceedings . . . at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . and the way in which they were passed upon by the Court." Petitioner's Statement of the Case omits the required specification.

The reason that petitioner failed to comply with Rule 23(i)(f) may lie in her failure to even suggest any federal questions until the final stages of the state proceedings. None were suggested in the pleadings, in any post-trial motion, in the briefs and arguments in the Illinois Appellate Court. The first time a federal question was presented was in petitioner's brief in the Supreme Court of Illinois, and that reference was confined to her claim that she was denied due process.

As appears hereafter in this brief, the Supreme Court of Illinois found that the Circuit Court's modification of custody was not founded upon any mechanical presumption as claimed by the petitioner. Accordingly, the court's affirmation of the trial court rested on its analysis of state law: It never had to deal with federal questions of the use of presumptions.

Petitioner's contention that she has been denied equal protection of the law under the Fourteenth Amendment was never raised until petitioner filed her Petition for Rehearing in the Supreme Court of Illinois. Since Supreme Court of Illinois Rule 367(b) limits petitions for rehearing to "points overlooked or misapprehended by the Court . . .", the equal protection argument was not properly before the Court. Accordingly, it was not considered nor ruled on by any of the judges. (See Pet. App. B and C).

Petitioner's equal protection claim was, therefore, not timely or properly raised in the state court. The due process argument is not a basis for federal jurisdiction since it was not timely raised, and the decision rests on adequate state grounds.

II.

The Record indicates no deprivation of constitutional rights.

Illinois law gives the divorce court continuing jurisdiction over the custody of the children of divorce, and requires a full hearing before modification of custody is ordered. In the instant case, the petitioner was afforded that full hearing, at which she was represented by an attorney of her choosing. She introduced evidence on all matters she thought relevant. No evidence was barred as irrelevant; no evidence was found to be immaterial; no witnesses were excluded. Accordingly, there was no denial of due process in the instant case.

Petitioner claims, however, that at the hearing she was "presumed" to be an unsuitable custodian by virtue of the fact that she was living with her lover in the

same house with the children. She asserts that, because of this supposed "presumption", she was not given a "meaningful" hearing as required by the Due Process clause. Her assertion is not supported by the record.

The uncontroverted facts, as testified to by all witnesses at the hearing, were that the petitioner was sharing the family home with her lover; that the children and others were made aware of the relationship; that petitioner intended to continue this relationship; that petitioner had instructed her daughters that her conduct was not immoral; and that the respondent father was a good, fit, and loving parent. Based on these *facts,* the trial court found that their father's home provided a healthier moral environment for the children and that their best interest would be served by change of custody. The court made a reasonable inference from the uncontroverted facts in evidence that the children's moral well-being was endangered by the environment in their mother's house. This ruling followed a long standing, respected line of Illinois cases: *Nye* v. *Nye,* 411 Ill. 408, 105 N.E. 2d 300 (1952); *Hahn* v. *Hahn,* 69 Ill. App. 2d 302, 216 N.E. 2d 229 (1965); *Kline* v. *Kline,* 57 Ill. App. 2d 244, 205 N.E. 2d 775 (1965); *Pratt* v. *Pratt,* 29 Ill. App. 3d 214, 330 N.E. 2d 244 (1975); *Strand* v. *Strand,* 41 Ill. App. 3d 651, 355 N.E. 2d 47 (1976); *Gehn* v. *Gehn,* 51 Ill. App. 3d 946, 367 N.E. 2d 508 (1977).

The overriding concern of the trial court was the best interests of the children, the established standard in Illinois custody cases. (Illinois Supreme Court Opinion in *Jarrett* v. *Jarrett,* Pet.App. 4a-5a). This standard, the best interest of the child, has been recognized as an appropriate one by this Court. *Quilloin* v. *Walcott,* 434 U.S. 246, 254 (1978).

In the *Quilloin* case, the best interest of the child was determinative even where it resulted in the permanent and total loss of parental rights in an adoption proceeding. In the instant case, petitioner has not lost her parental rights. The decision gives custody of the Jarrett girls to their father, a caring and affectionate parent who has had an uninterrupted relationship with his daughters. However, the petitioner was awarded reasonable visitation rights and she has regularly exercised these rights, spending several days each week with the children. The modification gave petitioner the identical parental rights enjoyed by the father prior to modification. (Cf. *In re Burrell,* 58 Ohio St. 2d 37, 388 N.E. 2d 38 (1979), cited by the petitioner. (Petition, 23) In that case the state was attempting to remove children from their mother's custody in order to make them wards of the state).

In affirming, the Supreme Court of Illinois emphasized the flexibility of Illinois courts in determining the best interests of children in custody disputes. As the Court states, no "mechanical rule" is laid down. (Pet. App. 7a). Rather, a set of guidelines has been formulated over the last several decades and reaffirmed by the court in *Jarrett* v. *Jarrett.* Under these guidelines, the court noted, "the courts have not denied custody to every parent who has violated the community's moral standards, nor do we now intimate a different rule." (Pet. App. 7a). Where children are unaware of their parent's moral indiscretion, where the immoral conduct can be expected to end, where the noncustodial parent is an inappropriate guardian, or where other reasons dictate continuing custody, the *Jarrett* case would not require modification. Examples of such instances are found

among the cases relied on by petitioner as well as those cited by the Supreme Court of Illinois. (Pet. App. 7a-8a). *Arden* v. *Arden,* 25 Ill. App. 2d 181, 166 N.E. 2d 111 (1960); *Christensen* v. *Christensen,* 31 Ill. App. 3d 1041, 335 N.E. 2d 581 (1975; *Hendrickson* v. *Hendrickson,* 49 Ill. App. 3d 160, 364 N.E. 2d 566 (1977); *Rippon* v. *Rippon,* 64 Ill. App. 3d 465, 381 N.E. 2d 70 (1978); *Huey* v. *Huey,* 25 Ill. App. 3d 20, 322 N.E. 2d 560 (1975); *Collins* v. *Collins,* 120 Ill. App. 2d 125, 256 N.E. 2d 108 (1970).

These cases demonstrate that the *Jarrett* decision has not created a "sub-class of parents" whose status justifies "termination of their parental rights." (Petition, 29). Many parents who are living in unconventional relationships have retained custody of their children and the *Jarrett* case will not prevent this in the future where the facts indicate that it is in the children's best interest. See, *In re Custody of Nodot,* 81 Ill. App. 3d 883, ... N.E.2d ..... (1980), a case decided after *Jarrett.* There the Illinois Appellate Court affirmed an order transferring custody to a father who was living with a person to whom he was not married. The court pointed out that the parties planned to marry and that, accordingly, *Jarrett* did not require denial of custody. *In re Custody of Nodot* makes it abundantly clear that no conclusive presumption was created by *Jarrett* barring custody to parents with live-in-lovers.

Petitioner seeks to involve this Court in a review of Illinois domestic relations law, "an area that has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1974). Such involvement would have a negative effect on the ability

of state courts to protect the welfare of children in custody disputes. The flexibility of trial courts would be severely diminished.

It should also be noted that if the instant case were reversed by this Court, a flood of custody cases would be presented to the federal courts. Every inference, every ruling not supported by a tangible bruise or bad grade, would become the basis for a constitutional dispute.

The divorce courts of Illinois, as in every other state, decide many custody matters on the basis of reasonable inferences from the facts before them. Few children who are the objects of custody disputes bear tangible signs of present injury. Most parents seeking custody are fit parents. The courts must look at the facts and draw reasonable conclusions as to which parent will provide the better environment.

Should a parent who chronically leaves a child alone at night retain custody? Should a parent who is a prostitute, an alcoholic or a drug addict be granted custody? In these situations, as in many others, there may be no present evidence of harm. Nonetheless, a court may reasonably infer that harm is possible and award custody to a parent whose behavior better serves the child's needs.

A case cited by petitioner provides another example of a court basing custody modification on a reasonable inference of harm. *In re Custody of Harne,* 77 Ill. 2d 714, 396 N.E.2d 499 (1979), removed custody from a mother who left the children with her 68 and 70 year old parents. Under the same statutory provision that governs the *Jarrett* case, (Ill. Rev. Stat., Ch. 40 §610(b), the court ruled that the grandparents were too old to provide

the best care for the children, although no present harm to the children was demonstrated. Would this inference be deemed a constitutionally impermissable "presumption"? If so, the federal courts can expect to be inundated with custody appeals.

Illinois courts have traditionally scrutinized the total environment offered by each parent, and have attempted to select the one best suited to the child's needs. *Jarrett* is a continuation of this tradition and is well within the province of state jurisdiction. Rather than utilizing fixed presumptions, the state courts have demonstrated a flexible and realistic approach in weighing the competing claims of the parents. If they are to continue to protect the welfare of children, the trial judges must be permitted to make common sense inferences and conclusions concerning the development and needs of the children in custody cases. Petitioner urges a standard of certainty which amounts to gambling with children's futures.

"To wait until later years to determine whether Jacqueline had inculcated her moral values in the children would be to await a demonstration that the very harm which the statute seeks to avoid had occurred," *Jarrett* v. *Jarrett,* (Pet. App. 9a).

CONCLUSION

As the petitioner has failed to properly raise any substantial federal question, and as the record indicates no deprivation of any constitutional rights, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR M. SOLOMON
7 S. Dearborn Street
Chicago, Illinois 60603
(312) 782-2603
Attorney for Respondent.